

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-7081

United States Court of Appeals

For the Second Circuit.

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Appellants,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

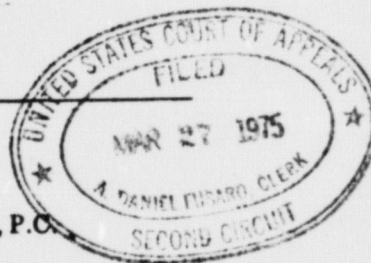
Appellees.

*On Appeal from an Order of the United States District
Court for the Eastern District of New York*

Appendix

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Appellants
515 Madison Avenue
New York, N.Y.
(212) 688-8555

JOSEPH P. MARRO
MARTIN L. ROTHSTEIN
Of Counsel



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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
VINCENZO BURRAFATO and :
ANTONINA BURRAFATO, :
 :
Plaintiffs : 74 C 846
 :
v. :
 :
U.S. DEPARTMENT OF STATE :
and U.S. IMMIGRATION & :
NATURALIZATION SERVICE, :
 :
Defendants. :
 :
-----X

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COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

-----X
VINCENZO BURRAFATO and :
ANTONINA BURRAFATO, :
Plaintiffs, :
v. : COMPLAINT
U.S. DEPARTMENT OF STATE and :
U.S. IMMIGRATION & NATURALIZATION :
SERVICE, :
Defendants. :
-----X

Plaintiffs, complaining of defendants, by their
Attorneys, Fried, Fragomen & Del Rey, P.C., respectfully
show to this Court, and allege as follows:

1. Plaintiffs are husband and wife, and reside in
Brooklyn, New York, within the jurisdiction of this Court.
Plaintiff Antonina Burrafato is a citizen of the United States
whose petition to grant "immediate relative" status to plaintiff,
Vincenzo Burrafato, a national of Italy, has been duly approved
by defendant Immigration & Naturalization Service. They are
the parents of Giuseppe Burrafato, age 9, and of Francesco
Burrafato, age 11, both lawful permanent residents of the
United States.

2. Vincenzo Burrafato duly applied for an immigration
visa to come to the United States as the husband of a United
States citizen. He was refused a visa by the Consulate General
of the United States in Palermo, Italy, on a finding of
ineligibility under Section 212(a) of the Immigration &
Nationality Act (8 U.S.C., Sec. 1182(a)). Such finding was
affirmed by the U.S. Department of State.

3. Section 212(a) lists 31 subparagraphs upon
which a finding of ineligibility could be made, including such

diverse grounds as mental retardation, polygamy, likelihood of becoming a public charge, illiteracy, membership in a Communist organization, drug addiction, conviction of crime, avoidance of service in the United States Armed Forces, etc. The Consulate General and the Department of State refused to divulge either the facts constituting the basis for the refusal, or even the specific subsection of law under which the visa was refused. Plaintiff Vincenzo Burrafato was thus prevented from attempting to overcome the secret ground of refusal.

4. The manner of such refusal was in violation of the Regulations of the Department (22 C.F.R., Section 42.130); and in addition deprived plaintiffs of their right to procedural due process of law.

5. On information and belief, plaintiff Vincenzo Burrafato was at all times mentioned above, and still is fully eligible to receive an immigration visa, and to come to the United States to live with his United States citizen wife and lawfully resident children. He is not ineligible for a visa under any provision of Section 212(a). The refusal of a visa to him was in violation of his statutory rights to receive such visa, and unlawful. Its effect was to deprive plaintiff Antonina Burrafato of her statutory right to have her husband with her in the United States, and to deprive her children of their father's presence; such refusal also threatened and still threatens to deprive her of the consortium and support of her husband, in violation of her rights under the laws of the United States. The refusal of the visa was arbitrary and capricious, and denied her constitutional right to due process of law under the Fifth Amendment to the United States Constitution.

6. Defendant, U.S. Immigration & Naturalization Service has aided and abetted, and continues to aid and abet the defendant U.S. Department of State in its unlawful denial of Vincenzo Burrafato's statutory right to enter the United States for permanent residence, and in its denial of Antonina Burrafato's statutory and constitutional right not to be deprived of her husband's presence, consortium and support, by refusing to admit Vincenzo Burrafato to the United States as a lawful permanent resident, and by refusing to recognize the right of Vincenzo Burrafato to be treated and considered a lawful resident of the United States on the claim and pretext that he has not been issued an immigration visa by the Consulate General in Palermo, although well-knowing that such refusal was in violation of law and in denial of plaintiffs' statutory and constitutional rights.

7. Jurisdiction of this Court is claimed by virtue of 8 U.S.C., Sec. 1329, 5 U.S.C., Sec. 703-705, and/or 28 U.S.C. Sections 1361, 2201 and 2202.

WHEREFORE, plaintiffs pray for judgment as follows:

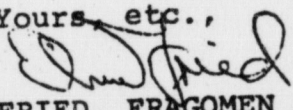
(1) (a) Declaring that plaintiff Vincenzo Burrafato shall be deemed a lawful permanent resident of the United States as of the date an immigration visa was improperly and unlawfully refused him by the U.S. Consulate General at Palermo, and (b) requiring the defendants to amend their records to reflect the lawful residence status that should have been accorded to Vincenzo Burrafato; or in the alternative,

(2) (a) Declaring that the refusal of an immigration visa to Vincenzo Burrafato was and is unlawful, and deprives plaintiffs of their statutory and constitutional rights, and

(b) directing that such visa be issued by a Consulate of the United States under the jurisdiction of the Department of State, and (c) enjoining defendant U.S. Immigration & Naturalization Service from taking any action to separate Vincenzo Burrafato from his wife, Antonina Burrafato unless and until he is issued such a visa; or in the alternative,

(3) (a) Declaring that the refusal of the Department of State to state the reason or reasons for denial of a visa to Vincenzo Burrafato, and the subsection of Section 212(a) (8 U.S.C., Section 1182(a)) its denial was based, and the consequent refusal by said defendant to allow Vincenzo Burrafato to overcome by evidence such ground of denial, was and is unlawful, and (b) requiring said defendant to accord such right to Vincenzo Burrafato, and (c) enjoining defendant U.S. Immigration & Naturalization Service from taking any action to separate Vincenzo Burrafato from his wife, Antonina Burrafato until and unless he is accorded the rights so declared and is thereafter properly refused an immigration visa.

Yours etc.,


FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Plaintiffs
515 Madison Ave.
New York, N.Y. 10022
Tel. No. 212 - 688-8555

CIS:PAG:eh
F. #740681

DEFENDANTS' NOTICE OF MOTION TO DISMISS THE COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

VINCENZO BURRAFATO and	:	
ANTONINA BURRAFATO,	:	<u>NOTICE OF MOTION</u>
	:	
Plaintiffs,	:	Civil Action
	:	No. 74 C 846
- against -	:	
	:	
U. S. DEPARTMENT OF STATE	:	
and U. S. IMMIGRATION &	:	
NATURALIZATION SERVICE,	:	
	:	
Defendants.	:	

----- X

S I R :

PLEASE TAKE NOTICE that upon the summons and complaint and the annexed affidavit of PETER A. GOLDMAN, the defendants will move this Court, before the Honorable Walter Bruchhausen in the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, on October 30, 1974 at 10:00 A.M. or as soon thereafter as counsel can be heard for an order, pursuant to F.R.Civ.P. 12(h), dismissing the complaint on the grounds that this court lacks jurisdiction over the subject matter of this action, and for such other relief as to this court may seem just and proper.

Dated: Brooklyn, New York
October 3, 1974

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By:

Peter A. Goldman
PETER A. GOLDMAN
Assistant U. S. Attorney

TO:
FRIED, FRAGOMEN & DEL RAY, P.C.
Attorneys for Plaintiffs
515 Madison Avenue
New York, New York 10022

JDP:PAG:eh
F. #740681

AFFIDAVIT OF PETER A. GOLDMAN IN SUPPORT OF THE MOTION
TO DISMISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

VINCENZO BURRAFATO and	:	
ANTONINA BURRAFATO,	:	<u>AFFIDAVIT</u>
	:	
Plaintiffs,	:	Civil Action
	:	No. 74 C 846
- against -	:	
	:	
U. S. DEPARTMENT OF STATE and	:	
U. S. IMMIGRATION &	:	
NATURALIZATION SERVICE,	:	
	:	
Defendants.	:	

----- X

STATE OF NEW YORK)
 : ss.:
COUNTY OF KINGS)

PETER A. GOLDMAN, being duly sworn, says:

1. I am an Assistant United States Attorney for the Eastern District of New York. I am familiar with all proceedings between the captioned parties. This affidavit is submitted in support of defendants' motion to dismiss the plaintiffs' complaint pursuant to F.R.Civ.P. 12(h).

2. This action was commenced by service of the summons and complaint upon the United States Attorney's Office for the Eastern District, the Immigration and Naturalization Service and the Department of State. By stipulation of the parties, time to move or answer the complaint was extended to October 3, 1974.

3. This action was brought for declaratory relief, to have plaintiff VINCENZO BURRAFATO "be deemed a lawful permanent resident of the United States;" injunctive relief prohibiting the Immigration and Naturalization Service from taking any action to separate VINCENZO BURRAFATO from his family; and to review the decision of the United States Foreign Consulate's denial of an immigration visa to VINCENZO BURRAFATO. The prayer for declaratory and

injunctive relief necessarily mandates a review of the Consulate's denial of an immigration visa to plaintiff VINCENZO BURRAFATO.

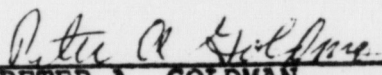
4. Upon information and belief at or about February, 1970, plaintiff applied for an immigration visa in Palermo, Italy. The immigration visa was denied by the American Consul, Palermo, Italy, pursuant to Section 212(a) (27) [association with organized criminal society] of the Immigration and Nationality Act (8 U.S.C. §1182(a)). The basis of my belief is the file and records of the Immigration and Naturalization Service and the Department of State.

5. Upon information and belief, at or about February 17, 1970, plaintiff VINCENZO BURRAFATO entered the United States of America as an illegal alien without a visa, as a uninspected individual. Plaintiff VINCENZO BURRAFATO has refused to reveal how or where he entered this country. The basis of my belief is the file and records of the Immigration and Naturalization Service and the Department of State.

6. On July 25, 1974, after a hearing before Immigration Judge Ira Fieldsteel, in accordance with the Immigration and Naturalization Service Order To Show Cause and Notice of Hearing, plaintiff VINCENZO BURRAFATO was found to be an illegal alien. Plaintiff VINCENZO BURRAFATO was granted a voluntary departure in lieu of an order of deportation. Upon information and belief plaintiff was represented by counsel at the immigration hearing. The time for plaintiff VINCENZO BURRAFATO's voluntary departure has been extended from November 25, 1974 to December 30, 1974.

7. As more fully articulated in the defendants' memorandum submitted in support of their motion, it has been consistently held that the courts are without jurisdiction to review a United States Foreign Consulate's denial of an immigration visa.

WHEREFORE, defendants respectfully submit that this court issue an order dismissing the complaint on the grounds that this court lacks subject matter jurisdiction.



PETER A. GOLDMAN
Assistant U. S. Attorney

Sworn to before me this
day of October, 1974.

AFFIDAVIT OF MARTIN L. ROTHSTEIN IN OPPOSITION TO THE
MOTION TO DISMISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
VINCENTO BURRAFATO and :
ANTONINA BURRAFATO, :
 :
Plaintiffs :
v. : AFFIDAVIT IN OPPOSITION
 : TO MOTION TO DISMISS
 :
U.S. DEPARTMENT OF STATE and : 74 C 846
U.S. IMMIGRATION & NATURALIZATION :
SERVICE, :
 :
Defendants. :
 :
-----X

STATE OF NEW YORK)
 :SS.:
COUNTY OF NEW YORK)

MARTIN L. ROTHSTEIN, being duly sworn, deposes and says:

1. I am of counsel to Fried, Fragomen, & Del Rey, P.C., the attorneys for the plaintiffs in this proceeding, and I am familiar with the background facts involved in this action.
2. This affidavit is submitted in opposition to defendants' motion to dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure.
3. This action was brought for judicial relief declaring that plaintiff VINCENZO BURRAFATO be deemed a lawful permanent resident of the United States, and that the denial of an immigration visa to plaintiff was unlawful and violated his statutory and constitutional rights; and ordering that the defendants be enjoined from deporting plaintiff until and unless he is accorded the rights improperly denied him, and is either issued an immigrant visa, or properly refused such a visa.
4. Plaintiff, Vincenzo Burrafato, is the husband of a United States citizen, plaintiff Antonina Burrafato, and is the father of two children, both lawful permanent residents of the

United States.

5. Upon information and belief, plaintiff Vincenzo Burrafato, on or about February 1970, applied for an immigrant visa at the American Consulate in Palermo, Italy. Plaintiff was denied a visa, but the consular officials refused to divulge to plaintiff the reason for such denial in violation of State Department Regulations (22 CFR 42.130(a)), stating only that it was under Section 212(a) of the Immigration and Nationality Act.

6. Upon information and belief, plaintiff applied to the United States Department of State in order to have the State Department review the visa denial by the Consulate in Palermo, pursuant to regulations providing for such review (22 CFR 42.130(c)). The State Department affirmed the visa denial and also refused to inform plaintiff of the reason for such visa denial other than that it was under Section 212(a).

7. Section 212(a) of the Immigration and Nationality Act contains thirty-one subsections upon which a finding of ineligibility for a visa can be made, including such diverse grounds as mental retardation, polygamy, illiteracy, membership in a Communist organization, conviction of crime, drug addiction, etc.

By failing to advise plaintiff of the reason for the denial of a visa, it was impossible for plaintiff to attempt to overcome the visa denial by supplying additional evidence, as he must be permitted to do under 22 CFR 42.130.

8. It was not until the Government filed its motion to dismiss plaintiff's complaint, in October, 1974, that plaintiff was informed of the reason for the visa denial. Paragraph 4 of the affidavit in support of the Government's motion, filed almost five years after plaintiff had applied for an immigrant visa, asserts that such denial was predicated upon "Section 212(a)(27) (Association with organized criminal society)."

The Government does not attempt to explain what it means by "association with organized criminal society." The Government fails to inform plaintiff of the basis for their contention that he is "associated" with "organized criminal society." There is no explanation of the activities allegedly engaged in by plaintiff that would make him associated with "organized criminal society," or even in what geographical location such alleged activities took place.

9. Plaintiffs contend that the United States Department of State made the following errors of law in its adverse determination which this court has the necessary subject matter jurisdiction to review.

a) The directive by the State Department to its consular officials that it need not divulge to plaintiff the reason for the denial of a visa was in violation of 22 CFR 42.130(a).

b) The ruling by the State Department that "association with organized criminal society" falls within subsection 27 of Section 212 was erroneous even assuming that such association were proven as to plaintiff, Vincenzo Burrafato.

10. Plaintiffs also contend that the Court has jurisdiction to review the denial of due process of law to plaintiffs by both the consular officials and the State Department, by their failure to follow the procedures in 22 CFR 42.130 when a visa application is denied, and by their applying an erroneous rule of law with respect to subdivision 27 of Section 212(a) of the immigration laws.

11. Plaintiff, Vincenzo Burrafato, was deprived of an opportunity to overcome the finding of ineligibility for an immigrant visa for four years due to the callous and inhumane attitude of the State Department to plaintiff and his family and the unjustified refusal of said defendant to reveal the basis for such find-

ing. Had the Consulate and the State Department told Mr. Burrafato that the sole basis for refusing him a visa was that he had an "association with criminal society" he would, on information and belief, have long ago shown he was not ineligible under that subdivision, and would by now be a resident of the United States and not be under an immigration order to leave the United States.

12. The Government's motion is based on a concept repugnant to law, to wit, that the action of a State Department official is beyond judicial scrutiny, no matter how arbitrary or illegal it may be, and no matter that its consequence might be to separate a husband from his American wife, a father from his resident children. There is no place in law for unbridled power on the part of any official to violate the law: jurisdiction of this Court is implicit on basic due process of law.

Wherefore, based on this affidavit and the supporting memorandum of law, plaintiffs respectfully submit that this Court has the necessary subject matter jurisdiction to review errors of law committed by the State Department, as well as by the Consulate at Palermo, as well as the denial of due process of law to plaintiffs by the State Department and its consular officials.

MARTIN L. ROTHSTEIN
Attorney for Plaintiffs

Sworn to before me this
day of , 1974/

DECISION AND ORDER OF THE HON. WALTER BRUCHHAUSEN, DATED
JAN. 20, 1975 WITH ATTACHMENTS CONSISTING OF THE ADMINISTRATIVE
ORDER TO SHOW CAUSE AND ORDER OF THE IMMIGRATION JUSTICE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VINCENZO BURRAFATO and ANTONINA
BURRAFATO,

Plaintiffs,

-against-

U. S. DEPARTMENT OF STATE and
U. S. IMMIGRATION & NATURALIZATION
SERVICE,

Defendants.

No. 74 C 846

January 20, 1975

Appearances:

FRIED, FRAGOMEN & DEL REY, ESQS.
Attorneys for Plaintiffs
MARTIN L. ROTHSTEIN, ESQ.
LEONARD L. FINKEL
Of Counsel

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York
Attorney for Defendants
PETER A. GOLDMAN, ESQ.
Assistant U. S. Attorney
Of Counsel

BRUCHHAUSEN, D. J.

The defendants, by Notice of Motion, dated
October 3, 1974, returnable on October 30, 1974, moved

for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint upon the ground of lack of jurisdiction of the subject matter of this action.

The plaintiffs instituted this action for declaratory relief, to have the plaintiff, Vincenzo Burrafato, deemed a lawful citizen of the United States, injunctive relief and to review the decision of the United States Foreign Consulate's denial of an immigration visa to him. In paragraph 2 of the complaint, the plaintiffs allege, viz:

"Vincenzo Burrafato duly applied for an immigration visa to come to the United States as the husband of a United States citizen. He was refused a visa by the Consulate General of the United States in Palermo, Italy, on a finding of ineligibility under Section 212(a) of the Immigration & Nationality Act (8 U.S.C., Sec. 1182(a)). Such finding was affirmed by the U. S. Department of State."

The records of the Immigration and Naturalization Service and The Department of State disclose that in or about February 1970 the visa was denied pursuant to Section 212(a)(27) of the said Act (association with

organized criminal society).

8 U.S.C. 1182 provides, viz:

"Excludable aliens - General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States. ***

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."

On or about February 17, 1970, the plaintiff, Vincenzo Burcafato, entered this country at an unknown location as an illegal citizen, without having been inspected. Subsequent to his arrival, the Immigration and Naturalization Service caused an Order to Show Cause and Notice for a Deportation Hearing to be served upon him pursuant to 8 U.S.C. 1252, The Immigration and Nationality Act.

On or about December 7, 1972, the said plaintiff was served with an order by the Immigration and Naturalization Service to show cause why he should not be

deported. He was represented by counsel at the hearing. Annexed and marked, Exhibit A, is a copy of the said order.

Also annexed hereto, and marked Exhibit B, is a copy of the decision of Immigration Judge Ira Fieldsteel dated July 25, 1974, stating that "Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause."

In Noel v. Chapman, Circuit 2, dated January 3, 1975, the Court stated, viz:

"Recently, in Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), the Court reaffirmed the plenary power of Congress, quoting with approval the opinion of the first Mr. Justice Harlan in Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895):

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

In Kleindienst, supra, pages 769, 770, the Court stated:

"In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.

"** We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."

Again in that case at pages 766, 767, the Court stated:

"Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens."

Upon due deliberation, it is ordered that the complaint be and it is hereby dismissed.

Copies hereof are being forwarded to the attorneys for the parties.

Walter Bruchhausen
Senior U. S. D. J.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of

BURRAFATO, VINCENZO

Respondent.

To: _____
(name)

File No. A20 345 134

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Italy
and a citizen of Italy;
3. You entered the United States at an unknown place on
or about February 17, 1970
(date)
4. It was then your intention to seek employment and remain indefinitely in
the United States;
5. You were not in possession of a valid immigrant visa or other entry
document for permanent residence.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law: Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the possession hereof by said Act or regulations made thereunder.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at _____
20 W. Broadway, New York, N.Y., 11th floor
on December 8, 1972 at 8:45 a.m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: December 7, 1972

Form I-221
(Rev. 3-30-67)

IMMIGRATION AND NATURALIZATION SERVICE

(signature and title of issuing officer)

ACTING DISTRICT DIRECTOR, NEW YORK DISTRICT
(city and state)

(over)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION
WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE
CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry office will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which your deportation may be directed pursuant to law; and upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to persecution in any such country on account of race, religion, or political opinion.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

Before:

(signature and title of witnessing officer)

(date)

CERTIFICATE OF SERVICE

This order and notice were served by me on _____ in the following manner:
(date)

(signature and title of employee or officer)

File No. A 20345134

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

VINCENTO BARRA, A.K.A.

Respondent.

In Deportation Proceedings Under Section 242
of the Immigration and Nationality Act

DECISION OF THE
IMMIGRATION JUDGE

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before NOV 25 1974
(Date)

or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Italy on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to _____

Copy of this decision has been served on respondent.

Appeal: Waived ~~reserved~~

Date: Nov 25 1974

Place: New York

[Signature]
(Immigration Judge)

PLAINTIFFS' NOTICE OF APPEAL
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
VINCENZO BURRAFATO and	:
ANTONINA BURRAFATO	:
	:
Plaintiffs,	:
	:
V.	:
	:
U.S. DEPARTMENT OF STATE and	:
U.S. IMMIGRATION & NATURALIZATION	:
SERVICE,	:
	:
Defendants.	:
-----X	

NOTICE OF APPEAL
Civil Action No:
74 C846

Plaintiffs VINCENZO BURRAFATO and ANTONINA BURRAFATO,
hereby appeal to the U.S. Court of Appeals for the Second Circuit
from the Order of Hon. Walter Bruchhausen, United States District
Judge, entered in this action on the 21st day of January, 1975.

DATED: New York, N.Y.

January 24, 1975

ELMER FRIED
FRIED, FRAGONEN & DEL REY, P.C.
Attorneys for Plaintiffs
515 Madison Avenue
New York, N.Y. 10022
Telephone No.: (212) 688-0555

To: Peter A. Goldman
Assistant U.S. Attorney
Eastern District of New York
Federal Building
225 Cadman Plaza
Brooklyn, New York

APPELLANTS' ORDER TO SHOW CAUSE FOR A STAY OF DEPORTATION AND
VOLUNTARY DEPARTURE TIME
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
VINCENZO BURRAFATO and :
ANTONINA BURRAFATO, :
 :
Plaintiffs, : ORDER TO SHOW CAUSE WITH A
 : TEMPORARY RESTRAINING ORDER
v. :
 : 74 C 846
U.S. DEPARTMENT OF STATE and :
U.S. IMMIGRATION & NATURALIZATION :
SERVICE, :
 :
Defendants. :
 :
-----X

Upon the annexed affidavits of VINCENZO BURRAFATO and MARTIN L. ROTHSTEIN, sworn to on January 27, 1975, and it appearing that an appeal has been filed from the Order of the United States District Court for the Eastern District of New York, entered on January 21, 1975, dismissing the above-captioned action; and it further appearing that the plaintiffs, having moved by Order to Show Cause for an order pursuant to Rule 8 of the Federal Rules of Appellate Procedure preserving the status quo of this action pending determination of the appeal, it is now hereby

ORDERED, that the defendant, Immigration and Naturalization Service, Show Cause before this Court on the day of January, 1975 in Room of the U.S. Courthouse, 225 Cadman Plaza, Brooklyn, New York at 10:00 a.m. of that day, or as soon thereafter as counsel can be heard why an Order should not be made herein staying the defendant Immigration and Naturalization Service from deporting the plaintiff Vincenzo Burrafato pending a hearing and determination of the appeal herein and providing further that the privilege of voluntary departure previously granted to the plaintiff, be continued by the defendant until seven days following the final decision of the Court of Appeals or any other extensions that may be lawfully granted, and it is further

ORDERED, that pending the hearing and determination of this motion, the defendant Immigration Service be, and hereby is stayed from deporting plaintiff Vincenzo Burrufato, and from withdrawing the privilege of voluntary departure; and it is further

ORDERED, that the status quo shall be preserved in all respects pending hearing and determination of this motion, and it is further

ORDERED, that service of a copy of this Order shall be sufficient if served upon the office of the United States Attorney for the Eastern District of New York.

United States District Judge

Dated: New York, N. Y.
January , 1975
Issued at M.

AFFIDAVIT OF MARTIN L. ROTHSTEIN IN SUPPORT OF THE
ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
VINCENTO BURRAFATO and
ANTONINA BURRAFATO,

Plaintiffs,

v.

U. S. DEPARTMENT OF STATE and
U. S. IMMIGRATION & NATURALIZATION
SERVICE,

AFFIDAVIT IN SUPPORT
OF MOTION FOR STAY
PENDING APPEAL

74 C 846

Defendants.
-----X

Before: HON. WALTER BRUCHAUSON

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARTIN L. ROTHSTEIN, being duly sworn, deposes and
says:

1. I am of counsel to Fried, Fragonen & Del Rey, P.C.,
the attorneys for the plaintiffs in this proceeding, and I am
familiar with the background facts involved in this action.

2. This affidavit is submitted in support of the plaintiffs'
motion for a stay pending appeal pursuant to Rule 8 of the
Federal Rules of Appellate Procedure.

3. This action was brought for judicial relief declaring
that plaintiff VINCENZO BURRAFATO be deemed a lawful permanent
resident of the United States, and that the denial of an immigra-
tion visa to plaintiff was unlawful and violated his statutory
and constitutional rights; and ordering that the defendants
be enjoined from deporting plaintiff until and unless he is
accorded the rights improperly denied him, and is either issued
an immigrant visa, or properly refused such a visa according to law.

4. Plaintiff, Vincenzo Burrafato, is the husband of a United States citizen, plaintiff Antonina Burrafato, and is the father of two children, both lawful permanent residents of the United States. Mr. Burrafato was found deportable by an Immigration Judge on July 25, 1974, but was granted the privilege of voluntary departure pursuant to section 244 of the Immigration and Nationality Act 8 U.S.C. 1254, which means that he may leave voluntarily without an order of deportation being entered against him, and without suffering the consequences of deportation which are provided in Section 212 (a) (17) of the Act 8 U.S.C. 1182 (a) (17). Under said section, an alien who is deported may not return to the United States without special permission from the Attorney General regardless of his eligibility for a visa.

5. On October 3, 1974 the Government filed a motion to dismiss this action pursuant to Rule 12 (b) (5) of the Federal Rules of Civil Procedure. By stipulations dated December 6, 1974 and January 15, 1975, the United States Attorney agreed that Mr. Burrafato's time to voluntarily depart the United States be extended until seven days after the District Courts final determination of said motion.

6. On January 21, 1975, the decision of the Honorable Walter Bruchausen was filed herein granting the Government's motion and dismissing the complaint. Accordingly, plaintiff's time to voluntarily depart the United States will expire on midnight of January 28, 1975. A notice of appeal was filed on January 27, 1975.

7. The purpose of the stay requested herein is to preserve the status quo and to permit plaintiff to remain in the United States with his American family pending determination of his appeal without losing the privilege of voluntary departure granted to him by the Immigration Judge and without being deported. This motion has been brought on by Order to Show Cause rather than Notice of Motion because plaintiff's time to voluntarily depart the United States would have expired prior to the hearing of this motion in normal course.

8. Upon information and belief, the facts which resulted in the commencement of the present action in the District Court are as follows:

Plaintiff Vincenzo Burrafato, on or about February 1970, applied for an immigrant visa at the American Consulate in Palermo, Italy. Plaintiff was denied a visa, but the consular officials refused to divulge to plaintiff the reason for such denial in violation of State Department Regulations (22 CFR 42.130 (a)), stating only that it was under Section 212 (a) of the Immigration and Nationality Act.

Plaintiff appealed to the United States Department of State in order to have the State Department review the visa denial by the Consulate in Palermo, pursuant to regulations providing for such review (22 CFR 42.130(c)). The State Department affirmed the visa denial and also refused to inform plaintiff of the reason for such visa denial other than that it was under Section 212(a).

Section 212 (a) of the Immigration and Nationality Act contains thirty-one subsections upon which a finding of ineligibility for a visa can be made, including such diverse grounds as mental retardation, polygamy, illiteracy, membership in a

Communist organization, conviction of crime, drug addiction, etc.

By failing to advise plaintiff of the reason for the denial of visa, it was impossible for plaintiff to attempt to overcome the visa denial by supplying additional evidence, as he must be permitted to do under 22 CFR 42.130.

It was not until the Government filed its motion to dismiss plaintiff's complaint, in October, 1974, that plaintiff was informed of the reason for the visa denial. Paragraph 4 of the affidavit in support of the Government's motion, filed almost five years after plaintiff had applied for an immigrant visa, asserts that such denial was predicated upon "Section 212 (a) (27) (Association with organized criminal society)." Plaintiff Vincenzo Burrafato denies that he is or has ever been associated with organized criminal society. On information and belief, plaintiff Vincenzo Burrafato has never been convicted of a crime anywhere in the world.

The Government did not attempt to explain what it means by "association with organized criminal society." The Government failed to inform plaintiff of the basis for their contention that he is "associated" with "organized criminal society." There was no explanation of the activities allegedly engaged in by plaintiff that would make him associated with "organized criminal society," or even in what geographical location such alleged activities took place.

9. Plaintiffs contend that the United States Department of State made the following errors of law in its adverse determination which the District Court had the necessary subject matter jurisdiction to review.

a) The directive by the State Department to its consular officials that it need not divulge to plaintiff the reason for the denial of a visa was in violation of 22 CFR 42.130 (a).

b) The ruling by the State Department that "association with organized criminal society" falls within subsection 27 of Section 212 was erroneous even assuming that such association were proven as to plaintiff, Vincenzo Burrafato.

10. Plaintiffs also contend that the Court had jurisdiction to review the denial of due process of law to plaintiffs by both the consular officials and the State Department, by their failure to follow the procedures in 22 CFR 42.130 when a visa application is denied, and by their applying an erroneous rule of law with respect to subdivision 27 of Section 212 (a) of the immigration laws.

11. Plaintiff, Vincenzo Burrafato, was deprived of an opportunity to overcome the finding of ineligibility for an immigrant visa for four years due to the callous and inhumane attitude of the State Department to plaintiff and his family and the unjustified refusal of said defendant to reveal the basis for such finding. Had the Consulate and the State Department told Mr. Burrafato that the sole basis for refusing him a visa was that he had an "association with criminal society" he would, on information and belief, have long ago shown he was not ineligible under that subdivision, and would by now be a resident of the United States and not be under an immigration order to leave the United States.

12. We submit that the Government's motion was based on a concept repugnant to law, to wit, that the action of a State Department official is beyond judicial scrutiny, no matter how arbitrary or illegal it may be, and not matter that its consequence might be to separate a husband from his American wife, a father from his resident children. There is no place in law for unbridled power on the part of any official to violate the law: Jurisdiction of the Court is implicit in both statute and basic due process of law. Accordingly, we respectfully submit that the order of the District Court dismissing the action was erroneous and, plaintiffs intend to expeditiously pursue an appeal to the Court of Appeals.

13. Plaintiffs respectfully submit that the Government's interests will not be prejudiced by maintaining the status quo and permitting plaintiff Vincenzo Burrafato to remain with his family in the United States without being deported or losing the privilege of voluntary departure, and that such relief would well serve the compassionate and human interests which characterizes our laws governing Immigration and Nationality. Because Mr. Burrafato has complied with all Orders of the Immigration Service, and because no money judgment is involved herein, it is submitted that no bond on appeal is necessary.

14. No prior application for the relief requested has heretofore been made.

WHEREFORE, it is respectfully requested that the Court issue an order maintaining the status quo and providing that plaintiff Vincenzo Burrafato be permitted to remain in the United States without losing the privilege of voluntary departure until seven days following the final decision of the Court of Appeals in the appeal filed on January 27, 1975, and that the Immigration

and Naturalization Service be enjoined from taking any steps inconsistent with this order.

The United States Attorney has been informed of the relief requested herein.

MARTIN L. ROTHSTEIN
Attorney for Plaintiffs

Sworn to before me
this day of 1975.

AFFIDAVIT OF VINCENZO BURRAFATO IN SUPPORT OF THE
ORDER TO SHOW CAUSE

STATE OF NEW YORK)
) S.S.:
COUNTY OF NEW YORK)

I, VINCENZO BURRAFATO, being duly sworn, depose and say:

1. I was born in Valledolmo, Sicily, on March 28, 1930, where I have spent most of my life.

2. I attended elementary school in my home-town until 1941 or 1942 whereupon I went to work for a cobbler, Mr. Calogero Giuffre, in Valledolmo. I worked for Mr. Giuffre as an apprentice without salary, as is customary in Sicily, until 1951. I worked 6 days per week from 8am until as late as 10pm depending on the amount of work. During this time, while learning the trade of cobbler, I lived with my parents and brothers in the same town.

3. In 1951 I opened my own cobbler shop and started earning my own money. My working days were usually quite long and it was not unusual for me to remain at the shop until 8 or 9 p.m.

4. In 1960 I closed the cobbler shop and I invested my small savings in a medical laboratory in Palermo, Italy. I worked at this laboratory daily from 8am to 5 or 6 pm and lived in Palermo from Monday to Saturday. On Sunday I returned to Valledolmo to spend my day off there. The laboratory enterprise proved a poor investment and in 1961 it closed down.

5. In 1961 I returned to my home-town and married my present wife, a citizen of the United States. At the same time I re-opened my cobbler shop and worked as a cobbler until the end of 1962 or the beginning of 1963. At this time I opened a larger store selling shoes and clothing, which I operated with my wife's help. My working hours were from 8am until 9pm. I retained and operated this business until about September, 1968, at which time I sold it.

6. On July 18, 1962 my first child, Franco, was born and on February 20, 1965, my second son Giuseppe was born.

7. In 1968 my wife came to the United States and I remained in Italy with my two children. During the period September 1968 until February 1969

I was out of work because soon after my wife left for the United States my mother became ill and I had to take care of her in addition to my children. My wife returned to Italy in February 1969 to help me take care of the children.

8. Shortly after her return, we moved to Ragusa, Sicily, where one of my sisters lives, and I got a job in a framing factory which I kept until August 1971. In December, 1969, my mother passed away.

9. Sometime in 1970 I had applied for an immigrant visa at the American Consulate in Palermo. In January of 1971 my wife returned to the United States and shortly thereafter my children joined her here, while I remained in Italy. My application for an immigrant visa was denied without any reason or justification being given to me. The separation from my wife and children became unbearable and in spite of the denial of my application, I entered the United States in September, 1971, to join my family.

10. Since my entry in the United States I have had a steady job with Cardona Baker Company, a shoe factory located at 214 Dulfield Street, Brooklyn, where I have been working steadily from 8am to 5pm with many hours of overtime. My starting salary was \$80. per week, and my present salary is \$169. per week.

11. I declare that for all of my life I have been an honest, hard working, law-abiding person. I have worked hard to support my family and I have never been, nor am I now, associated with any criminal organization, nor have I ever been convicted of any crime anywhere in the world. I ask that the United States Government grant me the permanent resident visa for which I am eligible as the spouse of a U.S. citizen wife, and allow me to remain in the United States with my wife and family in lawful status.

Vincenzo Burrafato
VINCENZO BURRAFATO

Sworn to before me this

27th day of January, 1975

John E. Kennedy
Notary Public, State of New York
No. 470789, Qualified Notary Public
Commission Expires March 10, 1977

LETTER FROM THE DEPARTMENT OF STATE, DATED OCTOBER 21, 1971



DEPARTMENT OF STATE

Washington, D.C. 20520

RECEIVED

OCT 21 1971

PAVIA & HARCOURT

Mr. Donald J. Sisk
Pavia & Harcourt
Attorneys and Counselors at Law
63 Wall Street
New York, New York 10005

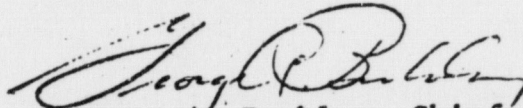
Dear Mr. Sisk:

I refer to our letter of September 22, 1971 concerning the immigrant visa case of Mr. Vincenzo Burrafato.

The Consulate General at Palermo reported that Mr. Burrafato's case has been carefully reviewed by that office. However, no facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act.

While it is our sincere desire to cooperate in every way possible to clarify the matter, the grounds for the refusal are of a confidential nature and we are prohibited from divulging either the specific subsection of law under which the visa was refused or the facts which constituted the basis for the refusal. However, the Department has had access to the essential facts and is of the opinion that the denial was fully warranted under the terms of the law.

Sincerely yours,


George A. Berkley, Chief
Public Services Division
Visa Office

ORDER OF JUDGE BRUCHHAUSEN, DATED JAN. 28, 1975, GRANTING A
STAY OF APPELLANT'S DEPORTATION AND VOLUNTARY DEPARTURE TIME

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
VINCENZO BURRAFATO and :
ANTONINA BURRAFATO, :
Plaintiffs, : ORDER
v. :
: 74 C 846
U.S. DEPARTMENT OF STATE and :
U.S. IMMIGRATION & NATURALIZATION :
SERVICE, :
Defendants. :
-----X

Upon the annexed affidavits of VINCENZO BURRAFATO and MARTIN
L. ROTHSTEIN, sworn to on January 27, 1975, and it appearing that
an appeal has been filed from the Order of the United States
District Court for the Eastern District of New York, entered on
January 21, 1975, dismissing the above-captioned action; and it
further appearing that the plaintiffs, having moved by Order to
Show Cause for an order pursuant to Rule 8 of the Federal Rules of
Appellate Procedure preserving the status quo of this action pend-
ing determination of the appeal, it is now hereby

WB
USD
1/28/75
~~ORDERED, that the defendant, Immigration and Naturalization
Service, Show Cause before this Court on the day of January,
1975 in Room of the U.S. Courthouse, 225 Cadman Plaza, Brooklyn,
New York at 10:00 a.m. of that day, or as soon thereafter as coun-
sel can be heard why an Order should not be made herein staying the
defendant Immigration and Naturalization Service from deporting the
plaintiff Vincenzo Burrafato pending a hearing and determination of
the appeal herein and providing further that the privilege of volun-
tary departure previously granted to the plaintiff, be continued by
the defendant until seven days following the final decision of the
Court of Appeals or any other extensions that may be lawfully
granted, and it is further~~

ORDERED, that ~~pending~~ ^{following} the hearing and determination of this motion, the defendant Immigration Service be, and hereby is stayed from deporting plaintiff Vincenzo Sarrafato, and from withdrawing the privilege of voluntary departure; and it is further

ORDERED, that the status quo shall be preserved in all respects pending ~~hearing and determination of this motion,~~ ^{appeal to the Second Circuit which shall be prosecuted expeditiously} and it is further

ORDERED, that service of a copy of this Order shall be sufficient if served upon the office of the United States Attorney for the Eastern District of New York.

/s/ WALTER BRUCHAUSON
United States District Judge

Dated: New York, N. Y.
January 28, 1975
~~Issued at~~

UNREPORTED DECISION IN MACDONALD V. KLEINDIENST, DATED
OCTOBER 10, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DWIGHT MACDONALD, SUSAN SONTAG, JACK
WILLIS, MICHAEL WEBB, VINCENT CANBY,
MICHAEL MYERSON, LEE LOCKWOOD,

Plaintiffs,

-against-

RICHARD G. KLEINDIENST, Deputy
Attorney General of the United States;
WILLIAM P. ROGERS, Secretary of State,

Defendants.
-----x

GAGLIARDI, D. J.

Plaintiffs, American citizens connected with the film-making industry, bring this action to hold unconstitutional and to enjoin the enforcement of §§ 212(a)(28) and (d)(3)(A) of the Immigration and Nationality Act of 1952 (hereinafter "the Act"), 8 U.S.C. §1182(a)(28), (d)(3)(A) (1970). In brief, the challenged sections provide that aliens advocating anarchism, world communism or the violent overthrow of the United States Government shall be ineligible to receive visas, §212(a)(28), and that such ineligibility may be waived by the Attorney General upon recommendation of the Secretary of State §212(d)(3)(A).

The facts in the case are not in dispute. In the summer of 1971, plaintiff Michael Myerson, the International

Director of American Documentary Films, invited four Cuban film makers to come to New York City and attend a Cuban Film Festival scheduled to commence on March 24, 1972.¹

The Cubans accepted the invitation; and in January of 1972, the Czechoslovak Embassy, acting on behalf of the Cubans, directed a diplomatic note to the State Department requesting the issuance of entrance visas. On February 18, 1972, the Cubans were informed through the Czechoslovak Embassy that their request had been denied by the Secretary of State. This denial precipitated the present action.

Initially, we must deal with the Government's contention that the present action is premature. In support of this contention the Government relies upon §221(a)(2) of the Act, 8 U.S.C. §1201(a)(2) (1970). Under this section, applications for nonimmigrant visas are required to be made to a consular officer of the United States. The Government argues that inasmuch as there has been no formal application made in this case, the refusal to issue entrance visas should be regarded as informal and

¹The Festival commenced on March 24, 1972, as scheduled. However, on March 25, officials of the Treasury Department acting pursuant to a search warrant seized some of the films on the ground that they had been brought into the country without a license. The Festival was postponed indefinitely and an action was instituted in the Southern District of New York to declare the federal licensing provisions unconstitutional. American Documentary Films, et al. v. Secretary of the Treasury, et al., 72 Civ. 1711.

preliminary rather than as final and is not subject to judicial review at this juncture. We find this position untenable. It is undisputed that the informal method of inquiry employed by the Cubans was developed with the knowledge and tacit approval of the immigration authorities to relieve Cuban citizens of the expense of traveling to another country in order to make a formal application which might ultimately be denied. Although it is clear that the immigration authorities were under no obligation to recognize this informal system of application and could have required strict compliance with the statutory procedure, having acceded to the establishment of this informal system and fostered its continued operation the Government cannot now insist upon formal application as a prerequisite to judicial review. It is admitted by the Government that if the Cubans had pressed their application by personally requesting entrance visas at the United States Consulate in Mexico, the request would have been denied under §3212 (a) (27), (a) (28). In effect, the Government seeks a ruling that would make a futile and expensive gesture the price of admission to the Federal Courts. We refuse to place so heavy and unnecessary an obstacle in the path of judicial review. See Pantam Books v. Sullivan, 372 U.S. 58 (1963). The immigration authorities having elected to permit the operation of these informal procedures must now accept the con-

sequences of that decision.

Having decided that this case is properly before the court, we turn to a consideration of the merits of the plaintiffs' argument. The plaintiffs contend that the Government's refusal to issue the visas, unsupported by any justification, violates plaintiffs' First Amendment right to receive information and ideas. That the First Amendment protects an individual's right to listen as well as his right to speak is settled beyond dispute. See, e.g., Lamont v. Postmaster General, 381 U.S. 479 (1965); Winters v. New York, 333 U.S. 507 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943). In Kleindienst v. Mandel, ___ U.S. ___, 40 U.S.L.W. 5103 (1972), the Supreme Court firmly established the proposition that First Amendment considerations may not be disregarded even in the context of immigration regulations.

The facts in Mandel are almost identical to those in the case before the court. In 1969, Mandel, a Belgian citizen and editor-in-chief of the Belgian Left Socialist weekly La Gauche, was invited to address the Stanford University Graduate Student Association. The Secretary of State requested a waiver but the Attorney General refused the request in a statement giving reasons for the denial. Following notification of ineligibility

under §212(b)(28) and denial of waiver under §212(d)(3)(A). Mandel instituted an action to declare unconstitutional several sections of the Immigration and Nationality Act of 1952, including those sections challenged here. Eight United States citizens, members of the academic community, joined Mandel in the action, asserting that Mandel's exclusion was an infringement on their First Amendment right to receive information. A three-judge district court found for the plaintiffs, holding §§ 212(a)(28) and (d)(3)(A) invalid as invoked to exclude Mandel and enjoining the enforcement of these sections to deny Mandel's application for an entrance visa. 325 F. Supp. 620 (E.D.N.Y. 1971). On appeal, the Supreme Court reversed, holding that

when the Executive exercises [the power to exclude aliens] on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. *Kleindienst v. Mandel*, supra at _____, 40 U.S.L.W. at 5108

Unlike Mandel, the Cuban film makers were given no justification for their exclusion. Clearly, such a denial of waiver without any justification does not satisfy the requirements of Mandel. We reject the

argument that Mandel should be interpreted as granting absolute and unfettered discretion to the immigration authorities. Since the denial of waiver in this case affected fundamental constitutional rights, we believe §212(d)(3)(A) must be construed to require a statement of reasons for denial, thereby securing the statute against constitutional attack. Accordingly, we hold that the Secretary of State is required to set forth in writing, at the time of the denial, his reasons for refusing to waive ineligibility.

The matter is remanded to the Secretary of State for further action in accordance with this decision.
So Ordered.

/s/ Irving R. Kaufman

U.S.C.J.

/s/ Charles M. Metzner

U.S.D.J.

/s/ Lee P. Gagliardi

U.S.D.J.

Dated: New York, New York
October 10, 1972.

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 294 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of March, 1975 deponent served the within *Appendix* upon *U.S. Attorney with Eastern Dist.*

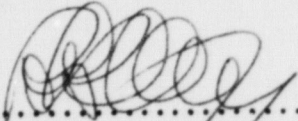
attorney(s) for

Aspellee

in this action, at

*225 Adman Plaza East
Brooklyn, NY 11201*

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


.....
ROBERT BAILEY

Sworn to before me, this
27 day of *March*, 1975.

William Bailey
WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1976